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No. 496

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

WIEN ALASKA AIRLINES, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PHILLIP D. BOSTWICK
910 17th Street, N.W.
Washington, D. C. 20006
Counsel for Petitioner

JAMES J. DELANEY, JR.
LAWRENCE R. SCHNEIDER
Of Counsel

[illegible] D. C.

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Petitioner Wien Alaska Airlines, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on April 6, 1967.

OPINIONS BELOW

The United States District Court for the District of Alaska did not render an opinion. The opinion of the Court of Appeals for the Ninth Circuit (App. B, *infra*, pp. 23-25) is reported at 375 F.2d 736.

JURISDICTION

The judgment of the court of appeals (App. C, *infra,* p. 26) was entered on April 6, 1967. A timely petition for rehearing *en banc* was denied on May 18, 1967 (App. D, *infra,* p. 26). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Section 7(b) of the Federal Employees' Compensation Act, 5 U.S.C. § 757(b), bars a third-party claim against the United States for non-contractual indemnity in an action where the plaintiff is an F.E.C.A. beneficiary and the federal employee whose negligence gave rise to the claim is a third-party defendant.

STATUTES INVOLVED

The statutory provisions involved are Sections 7(b) and 27 of the Federal Employees' Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. §§ 757(b), 777, and Sections 1346(b) and 2676 of the Federal Tort Claims Act, 60 Stat. 842, as amended, 28 U.S.C. §§ 1346(b), 2676 (App. A, *infra,* p. 21-22).

STATEMENT

This case arises out of the crash of one of petitioner's aircraft. The facts, admitted as true by respondent on its motion for summary judgment below, are briefly as follows: On April 17, 1964, petitioner's pilot was preparing to take off in petitioner's Cessna 185 aircraft from an airstrip at Moses Point, Alaska, for a daylight visual flight to Nome along the southern coast of the Seward Peninsula. The flight was part of petitioner's "bush operations" in Alaska—an air service

to sparsely-populated regions of northern and western Alaska provided by light aircraft equipped with skis in the winter. The sole passenger on board the aircraft was Kurt E. Backlund, an employee of the United States Federal Aviation Agency (F.A.A.).

Prior to take-off the pilot radioed the Moses Point Flight Service Station, operated by the F.A.A., and asked for the present and forecast weather for the purpose of planning a visual flight to Nome—that is, a flight which would not take the aircraft into weather requiring the pilot to fly on instruments. The Air Traffic Control Specialist on duty on that date was Anthony J. Narcisso, an employee of the F.A.A. Narcisso answered the call and gave the pilot "erroneous present and forecast weather which told [the] pilot that he could expect visual flying conditions along his intended flight path and at his destination" (R. 16). As a result of this information the pilot took off but the aircraft crashed shortly thereafter when it encountered weather conditions which did not permit visual flight. Both the pilot and Kurt E. Backlund were killed in the crash.

Backlund's widow, suing as administratrix of her husband's estate on behalf of herself and the surviving children, brought this action for wrongful death against petitioner in Alaska Superior Court, Third Judicial District (R. 1-4). Petitioner denied liability (R. 5-8) and moved for leave to implead Narcisso as a third-party defendant (R. 11-13). Petitioner's third-party complaint asked for full indemnity from Narcisso in the event it was held liable to the plaintiff on the ground that Wien's negligence, if any, was only passive or secondary, while the negligence of Narcisso was active and primary (R. 15-17). Petitioner's motion

was granted (R. 14) and Narcisso was impleaded in the state court action.

The United States Attorney in Anchorage appeared as counsel for Narcisso and removed the entire action to the United States District Court for the District of Alaska pursuant to the provisions of 28 U.S.C. § 1442(a)(1).[1] After removal to federal court Narcisso filed an answer in which he denied liability (R. 27). Petitioner then moved the district court for leave to amend its third-party complaint to add Narcisso's employer, the United States, as an additional third-party defendant (R. 21-25). The district court granted petitioner's motion (R. 31) and petitioner filed an amended third-party complaint seeking full indemnity from both Narcisso and the United States on the ground set forth above (R. 32-38). Thereafter the Government filed a motion for summary judgment, attaching to it certain exhibits which showed that Kurt E. Backlund had been an employee of the F.A.A. at the time of his death, that the Federal Bureau of Employees' Compensation had ruled that he was in the performance of his duties when killed, and that a compensation award had been entered under which Mrs. Backlund was receiving monthly payments of $525.00 for her-

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[1] Section 1442 provides:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

self and her children (R. 39-40). The Government argued to the district court that since Section 7(b) of the Federal Employees' Compensation Act, 5 U.S.C. § 757(b), barred any tort claim by Mrs. Backlund against the United States, the Government could not be liable to petitioner for all or part of her claim against Wien. The Government relied in this argument upon the Ninth Circuit's ruling in *United Air Lines, Inc.* v. *Wiener,* 335 F.2d 379 (9th Cir. 1964), *petition for cert. dismissed,* 379 U.S. 951 (1964), an action in which third-party claims against the United States for non-contractual indemnity were held barred where the plaintiffs were F.E.C.A. beneficiaries. The district court granted the Government's motion on the authority of *Wiener,* dismissed petitioner's third-party claim against the United States with prejudice, and directed the entry of a final judgment in favor of the Government pursuant to Rule 54(b) Fed. R. Civ. P. upon an express determination that there was no just reason for delay only (R. 41, 42).

On appeal to the Ninth Circuit petitioner sought reversal of the *Wiener* case, arguing that the holding in that case was contrary to this Court's rulings in *Weyerhaeuser* v. *United States,* 372 U.S. 597 (1963), and *Treadwell Construction Co.* v. *United States,* 372 U.S. 772 (1963); and that it resulted in the abrogation of this Court's decision in *United States* v. *Gilman,* 347 U.S. 507 (1954). The court of appeals affirmed the judgment below "on the authority of *Wiener, supra*" (R. 54), and denied petitioner's timely petition for rehearing *en banc* on May 18, 1967 (R. 56).

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Has Decided an Important Federal Question in a Way in Direct Conflict With the Decisions of This Court in Weyerhaeuser and Treadwell.

The decision of the court below in this case, which affirms a rule enunciated by it in *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir. 1964), *petition for cert. dismissed*, 379 U.S. 951 (1964), is in direct conflict with the decisions of this Court in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597 (1963) and *Treadwell Construction Co.* v. *United States*, 372 U.S. 772 (1963). In the *Weyerhaeuser* case this Court, in a unanimous opinion written by Mr. Justice Stewart, held that Section 7(b) of the Federal Employees' Compensation Act, 5 U.S.C. § 757(b), did not bar a claim by a shipowner against the United States for contribution based on the admiralty rule of divided damages. In that case a federal government employee named Ostrom sustained personal injuries when the Army Dredge he was on collided with a vessel owned by the Weyerhaeuser Steamship Company. Ostrom was awarded compensation in the sum of $329.01 under F.E.C.A. He then sued the shipowner and was paid $16,000 in settlement of his claims. Upon receipt of this settlement Ostrom repaid the United States the $329.01 he had received as compensation, as required by the Compensation Act. 5 U.S.C. § 777 (App. A, *infra*, p. 21). The shipowner then sued the United States in admiralty to recover damages. The district court found the two vessels mutually at fault for the collision and applied the admiralty rule of divided damages, including in the shipowner's damages the $16,000 paid to Ostrom. 174 F.Supp. 663, supplemented by 178 F.Supp. 496. The Ninth Circuit reversed, holding that Section 7(b) F.E.C.A. barred the

inclusion of the amount paid in settlement. 294 F.2d 179. The Ninth Circuit concluded that the purpose of Section 7(b) was to provide limited liability to the United States as an employer, and that "to allow a third party recovery against the United States on any ground *is* subversive of the statute limiting the liability of the United States." 294 F.2d at 181.

This Court granted certiorari in *Weyerhaeuser* and reversed the Ninth Circuit, unanimously rejecting its literal construction of Section 7(b). Finding the meaning of the statute far from "plain," as urged by the Government, this Court reviewed the legislative history of the Federal Employees' Compensation Act, originally passed in 1916, and Section 7(b), added in 1949, to ascertain the purpose behind that section. This Court said that the legislative history showed that in passing Section 7(b) Congress had been concerned with suits filed by federal government employees under various statutes against either the United States or corporate instrumentalities of the Government for the purpose of supplementing the inadequate benefits received by those employees under F.E.C.A.[2] This Court concluded:

> *The purpose of § 7(b), added in 1949, was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third parties,* much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases. 372 U.S. at 601 (emphasis added).

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[2] S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949), quoted in 372 U.S. at 601.

In the *Treadwell* case, *supra,* a federal government employee named Drake was seriously injured when a steel tank exploded while he was testing ordnance at the United States Army Arsenal in Watertown, Massachusetts. The tank was manufactured by Treadwell for the United States. Drake began receiving compensation payments from the Government under F.E.C.A. and he filed an action against Treadwell in United States District Court for the Western District of Pennsylvania. Treadwell impleaded the United States seeking full indemnification or contribution. Drake's main claim against Treadwell was tried before a jury, which returned a verdict in favor of the plaintiff for $180,000. A non-jury trial was then held on Treadwell's third-party claim against the Government and the district court found the Government to be a joint tortfeasor with Treadwell and awarded contribution in favor of Treadwell in the amount of $90,000.

The Government appealed this judgment to the Third Circuit, where the case was argued after the Ninth Circuit's *Weyerhaeuser* opinion but before this Court had granted certiorari in that case. The Third Circuit, finding no substantial distinction between a claim for contribution in admiralty and one at law, followed the "similar reasoning" of the Ninth Circuit in *Weyerhaeuser* and held that Section 7(b) F.E.C.A. barred Treadwell's claim for contribution or indemnity. 299 F.2d 789. The Third Circuit compared the "normal maritime rule of contribution" in the *Weyerhaeuser* case with the rule allowing contribution between joint tortfeasors, and concluded that both were "clearly within the language of Section 7(b)." 299 F.2d at 791. This Court granted certiorari in *Treadwell* three weeks after it decided the *Weyerhaeuser*

case, vacated the Third Circuit's judgment and remanded the case to the district court "for further consideration in light of *Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597." 372 U.S. 772.

In the *Wiener* case, *supra,* 31 actions for wrongful death were brought against United Air Lines as a result of a mid-air collision between its DC-7 and a United States Air Force F-100 jet fighter. In nine of the actions the plaintiffs' decedents were federal government employees. United sought non-contractual indemnity from the United States in all 31 cases and was awarded it by the Ninth Circuit in the 22 non-Government cases. As to the nine government employee cases, however, the Ninth Circuit affirmed the district court's dismissal of United's third-party claim for non-contractual indemnity. 335 F.2d at 402-404. The court of appeals, speaking through Judge Jertberg, said:

> [The Government] argues that by operation of the exclusive liability provision of this section [§ 7(b) F.E.C.A.] there is no underlying tort liability of the government to its employees and therefore there is no basis for indemnification. In our view United's claim for indemnity is . . . barred in accordance with . . . [this] contention. 335 F.2d at 402.

In answer to United's argument that this Court's pronouncements in *Weyerhaeuser* and *Treadwell* precluded such a result, the court of appeals said:

> The Supreme Court in Weyerhaeuser S.S. Co. v. United States, . . . held that the express provisions of [§ 7(b)] . . . do not qualify the historic admiralty rule of divided damages in mutual fault collisions. The admiralty rule of divided damages

> is to be distinguished from the rule of indemnity urged upon us by United since under admiralty law there arises from a collision involving mutual fault the right to apportionment of all damages resulting therefrom, including personal injuries, cargo damage, and damage to the ships. The divided damage rule is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured. On the other hand neither contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor to the person injured.
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> * * * * *
>
> United's claim for indemnity is not based upon a duty owed by the government to United by virtue of a contract, attenuated or otherwise, or by operation of a rule of law such as the divided damage rule of admiralty. There being no underlying liability on the part of the government, United's claim for idemnity must fall. We do not agree with United that the Supreme Court's remand in the case of Treadwell Construction Co. v. United States . . . [per curiam], represents a rejection by the court of these well settled principles. 335 F.2d at 402-404.

Petitions for certiorari were filed in *Wiener* by both United and the Government, but were later dismissed when the case was settled. 379 U.S. 951.

In the instant case petitioner sought reversal of *Wiener*, but the Ninth Circuit, speaking again through Judge Jertberg, affirmed the ruling and language of that case. Petitioner submits that the court of appeals' decision in the instant case, as in *Wiener*, is in direct conflict with this Court's decisions in *Weyerhaeuser* and *Treadwell* because there is no valid distinction between a claim for contribution in admiralty

and one for non-contractual indemnity at law insofar as the effect of Section 7(b) F.E.C.A. is concerned. This is so for at least three reasons: First, a claim for non-contractual indemnity is not based solely upon a duty owed by the indemnitor to the injured party. Such a claim has several bases, including one identical to the admiralty rule—a duty owed by the indemnitor to the indemnitee. As Dean Prosser states in this Treatise:

> Out of all this, it is extremely difficult to state any general rule or principle as to when indemnity will be allowed and when it will not. It has been said that it is permitted only where the indemnitor *has owed a duty of his own to the indemnitee;* that it is based on a "great difference" in the gravity of the fault of the two tortfeasors; or that it rests upon a disproportion or difference in character of the duties owed by the two to the injured plaintiff. Probably none of these is the complete answer, and, as is so often the case in the law of torts, no one explanation can be found which will cover all of the cases. Indemnity is a shifting of responsibility from the shoulders of one person to another; *and the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other.* This may be because of the relation of the parties to one another, and the consequent duty owed; or it may be because of a significant difference in the kind or quality of their conduct. PROSSER, LAW OF TORTS 281 (3d ed. 1964) (emphasis added).

Second, contribution or indemnity may be awarded without "the support of liability on the part of the indemnitor to the person injured." 335 F.2d at 403. The most common example is the case where the third-

party defendant cannot be liable to the plaintiff because the statute of limitations has run. *See, e.g., Keleket X-Ray Corporation* v. *United States,* 275 F.2d 167 (D.C. Cir. 1960).

Third, the cases which hold that there is a requirement of "underlying liability" or "common liability" are both illogical and unsound. Judge Jertberg relied upon *American Mut. Liability Ins. Co.* v. *Matthews,* 182 F.2d 322 (2d Cir. 1950), in making the aforementioned "distinction" in *Wiener.* The *Matthews* case involved a similar problem—whether Section 5 of the Longshoremen's and Harbor Workers' Compensation Act,[3] which is "nearly identical"[4] to Section 7(b) F.E.C.A. barred a claim for contribution by the shipowner against the injured employee's stevedoring employer. Judge Swan disallowed the claim on the ground that the shipowner and the stevedoring employer were not "joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured." 182 F.2d at 323. Professors Hart and Sacks trenchantly criticized the *Matthews* case as follows:[5]

> Why should there have to be "a common liability to the party injured?"
>
> A possible answer to this question might have been . . . that the right of contribution rests on the equitable principle of avoidance of unjust enrichment. The tortfeasor who pays the whole

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[3] 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* 33 U.S.C. § 905 is "nearly identical" to Section 7(b) F.E.C.A.

[4] *Weyerhaeuser* v. *United States,* 372 U.S. at 602.

[5] Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tenta. ed. 1958).

> amount of the damages which the two in combination have caused thereby effects the discharge of the other, since there cannot be a double recovery. For this benefit the other should pay or he will be unjustly enriched, and a fair measure of the benefit is fifty-fifty.
>
> It will be observed that if a common liabilty exists, this principle will serve always to justify contribution. *But it will be observed that the principle may be invoked also where the liabilities are not common either in the sense of being identical in amount or in the sense of flowing from breach of the same kind of duty. All that is necessary is that they be mutually exclusive in the sense that a satisfaction of one is a discharge of the other.* Hence, if [the shipowner's] payment of [the employee's] judgment had served to benefit [the stevedoring employer] by wiping out its liability to pay compensation, there would have been a basis for a claim by [the shipowner] for contribution at least in some amount. (pp. 524-525, emphasis added).

In the instant case the liabilities are mutually exclusive because the Government's liability to Mrs. Backlund under F.E.C.A. will be immediately discharged if petitioner is held liable to pay a judgment to her. 5 U.S.C. § 777. That is all that is—and should be—required by law to support a claim for indemnity, since that doctrine is based primarily upon the theory that a wrongdoer shall not be unjustly enriched.

The importance of the federal question involved in this case need not be labored here. Suffice it to say, this Court has twice granted certiorari to review lower court decisions concerning this very point—the effect of § 7(b) F.E.C.A. on a third party's claim for contribution or indemnity against the Government. The

number of federal government employees covered by F.E.C.A.,[6] the number of injuries sustained by them yearly,[7] and the pervasive nature of the Government's activities in our daily lives, all show conclusively that this is a federal question of the utmost importance and one which should be passed upon—and indeed, has been passed upon—by this Court.

II. The Ninth Circuit Has Rendered a Decision on an Important Federal Question in Direct Conflict With Applicable Decisions on the Same Matter in the Third Circuit.

In *Drake* v. *Treadwell Construction Co.*, 299 F.2d 789 (3d Cir. 1962), the Third Circuit held that Section 7(b) F.E.C.A. barred a third-party claim against the United States for contribution or indemnity where the plaintiff was an F.E.C.A. beneficiary. As noted above, this Court granted Treadwell's petition for certiorari, vacated the court of appeal's judgment, and remanded the case to the United States District Court for the Western District of Pennsylvania "for further consideration in light of *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597." 372 U.S. 772.

On remand to the district court the Government moved for further consideration of the question of liability of the United States, arguing that "The Weyerhaeuser decision was specifically restricted to the admiralty rule of divided damages in mutual fault collision cases and has no application to cases involving contribution under State law between joint tort-

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[6] 2,500,000 federal employees were covered by the Act in 1966 according to U. S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1966, at 412 (87th ed. 1966).

[7] 110,000 non-fatal injuries and 337 fatal injuries were sustained by federal employees in 1965. *Id.*

feasors."[8] The district court rejected this contention and reinstated its earlier judgment in favor of Treadwell.[9] The Government filed a notice of appeal from this judgment but later moved to dismiss the appeal "for the reason that the Solicitor General of the United States has recommended against appeal. . . ."[10] The appeal was subsequently dismissed.[11]

One month later this identical question came before the United States District Court for the Eastern District of Pennsylvania in *Hart* v. *Simons,* 223 F. Supp. 109 (E.D. Pa. 1963). In that case the plaintiff, a federal government employee injured by a machine in the course of her employment, sued the manufacturer of the machine after receiving F.E.C.A. benefits. The manufacturer impleaded the United States seeking contribution or indemnity. *The Government did not move for dismissal of the third-party complaint.* The plaintiff however, made such a motion, urging that Section 7(b) F.E.C.A. barred any recovery by the manufacturer against the United States. In its opinion the district court noted that this question had been decided by the Third Circuit in favor of the United States in *Drake* v. *Treadwell, supra.* It said, "This decision, of course, would control the present case except that Treadwell was considered by the United States Supreme Court which entered an order [vacating

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[8] Memorandum Order filed July 8, 1963 in *Drake* v. *Treadwell Construction Co., et al,* United States District Court for the Western District of Pennsylvania, Civil Action No. 14517.

[9] Order of Court filed July 9, 1963. *Id.*

[10] Motion for Dismissal of Appeal filed September 24, 1963. *Id.*

[11] Order filed September 24, 1963. *Id.*

the judgment]." After reviewing the *Weyerhaeuser* and *Treadwell* cases the district court said:

> Using the same language and following the reasoning of the Supreme Court in the Weyerhaeuser case, it must be concluded also that there is no evidence that Congress in enacting the exclusive liability section of the Federal Employees' Compensation Act was concerned with the rights of unrelated third parties, *much less of any purpose to disturb settled doctrines of the law of contribution or indemnity affecting the mutual rights and liabilities of parties in tort cases.* The motion to dismiss must be denied.
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> * * * * *
>
> The United States is not shielded from liability by the exclusive liability provisions of the Federal Employees' Compensation Act. Treadwell Construction Co. v. United States, 372 U.S. 772, 83 S.Ct. 1102, 10 L.Ed.2d 186 (1963); Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 83 S.Ct. 926, 10 L.Ed.2d 1 (1963). (223 F.Supp. at 111, emphasis added).

It can thus be seen that because of this Court's vacation of the judgment in *Drake* v. *Treadwell Construction Co., supra,* the rule in the Third Circuit on this important federal question is in direct conflict with the rulings of the Ninth Circuit in *Wiener* and the instant case. It is unlikely that this issue will ever again reach the Third Circuit since the Government is no longer raising this defense in that Circuit. But even if the question should be appealed by some other party it is unconceivable that the Third Circuit would rewrite *Drake* v. *Treadwell Construction Co.,* 299 F.2d 789. The court of appeals found in that case that there was no distinction between contribution in admiralty and contribution or indemnity at law so far as the

effect of Section 7(b) F.E.C.A. is concerned. It cannot seriously be argued that the Third Circuit would now accept the Ninth Circuit's "distinction" of *Weyerhaeuser* and *Treadwell,* which in truth is mere semantics. Therefore, these circuits are in direct conflict on this important federal question and this Court should grant certiorari to resolve this conflict.

III. The Ninth Circuit's Decision in This Case Is in Direct Conflict With This Court's Ruling in United States v. Gilman That the United States May Not Recover Indemnity From Its Employee Whose Negligence Gave Rise to the Claim

In *United States* v. *Gilman,* 347 U.S. 507 (1954), this Court unanimously held that the Government could not recover indemnity from one of its employees whose negligence gave rise to the claim against the United States under the Federal Tort Claims Act. Weighing the financial burden to the United States imposed by a rule prohibiting indemnity against the financial burden to federal government employees imposed by a rule allowing it, this Court found in favor of the employee. It noted that 28 U.S.C. § 2676 (App. A, *infra,* p. 22) makes any judgment against the United States a complete bar to any action against the federal employee whose act or omission gave rise to the claim, and found that the statutory scheme of the Federal Tort Claims Act barred any claim by the Government against the negligent employee for indemnity.

It will be noted that the result of the Ninth Circuit's ruling in the instant case is to abrogate this Court's holding in *Gilman.* Except for drivers of government motor vehicles,[12] the government employee whose act or omission gave rise to the claim may be

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[12] 28 U.S.C. § 2679(b).

sued as well as the United States, whose liability is based upon *respondeat superior*. That was done here when petitioner impleaded Narcisso in the state court action. If Section 7(b) F.E.C.A. is no bar to petitioner's third-party claim against the United States, then a judgment against the Government in the third-party action would constitute a complete bar to petitioner's third-party claim against Narcisso. 28 U.S.C. § 2676. But if Section 7(b) bars petitioner's claim against the Government and Narcisso is found in this case to be either the sole tortfeasor or the active tortfeasor if petitioner and Narcisso are held not to be *in pari delicto,* then Narcisso will pay *all* of any judgment entered in favor of plaintiff. Not only that, upon receipt of this judgment the plaintiff will be required to reimburse the Government for the amount of compensation already paid her under F.E.C.A. and the United States will be discharged from further liability under that Act. The result is the indemnification of the United States by Narcisso, which has been held by this Court to be barred by the Tort Claims Act.

As noted by this Court in *Gilman,* this federal question is a matter of utmost importance to hundreds of thousands of federal government employees. In the field of aviation alone the potential liability of individual federal government employees is daily becoming more apparent. In *Ingham* v. *Eastern Air Lines, Inc.,* 373 F.2d 227 (2d Cir. 1967), a case factually similar to the instant case, the Government was recently held liable for the negligence of an F.A.A. Air Traffic Controller in failing to provide accurate and up-to-date weather information to the pilot of a passenger-carrying aircraft. Add to the facts of the *Ingham* case an aircraft loaded with federal government employees

and the Ninth Circuit's ruling in *Wiener* and the instant case becomes intolerable for Air Traffic Controllers alone.[13] When one adds to the field of aviation all the other fields in which the Government is intimately involved, it becomes readily apparent that the instant case involves a federal question of utmost importance to hundreds of thousands of federal government employees, and this Court should grant certiorari to review the Ninth Circuit's ruling on this question.

IV. Even If the Government's Argument That This Case Is Distinguishable From Weyerhaeuser and Treadwell Is Accepted, Then the Ninth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court

Even if the Ninth Circuit's distinction of the *Weyerhaeuser* and *Treadwell* cases is valid, which petitioner strongly denies, then that court's ruling in *Wiener* and the instant case—that § 7(b) F.E.C.A. bars third-party claims against the United States for non-contractual indemnity where the plaintiff is an F.E.C.A. beneficiary—is the first abrogation by a court of appeals[14] of an ancient common law tort doctrine based upon the premise that a wrongdoer shall not be unjustly enriched. Certainly all the reasons which caused this Court to grant certiorari in *Weyerhaeuser* to review

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[13] A further intolerable consequence of the *Wiener/Wien* rule for Air Traffic Controllers and other government employees is the fact that, as here, they will be represented in any action against them by the United States Attorney, who will make every effort to get their employer dismissed from the case, leaving them to pay the judgment.

[14] *Busey* v. *Washington*, 225 F. Supp. 416 (D. D.C. 1964), decided several months before *Wiener*, is in accord. *Busey* was settled while on appeal to the United States Court of Appeals for the District of Columbia Circuit.

the Ninth Circuit's abrogation of an ancient admiralty doctrine of contribution are applicable to this case involving that court's abrogation of a common law right of indemnity.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILLIP D. BOSTWICK
910 17th Street, N.W.
Washington, D. C. 20006
Counsel for Petitioner

JAMES J. DELANEY, JR.
LAWRENCE R. SCHNEIDER
Of Counsel

August 1967

APPENDIX A

The Federal Employees' Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. § 751 *et seq.*, provides in pertinent part:

> Section 757(b). The liability of the United States or any of its instrumentalities under sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel.
>
> • • • • •
>
> Section 777. If an injury or death for which compensation is payable under this chapter is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:
>
> (A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount

of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury.

The Federal Tort Claims Act, 60 Stat. 842, as amended, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, provides in pertinent part:

Section 1346(b). Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

Section 2676. The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,004

WIEN ALASKA AIRLINES, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

[April 6, 1967]

On Appeal from the United States District Court
for the District of Alaska

Before: JERTBERG and MERRILL, Circuit Judges, and MATHES, District Judge.

JERTBERG, Circuit Judge:

The issue of law involved in this appeal is whether Section 7(b) of the Federal Employees' Compensation Act [5 U.S.C. § 757(b)],[1] bars a third-party claim for non-contractual indemnity in an action where plaintiff is an F.E.C.A. beneficiary.

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[1] Sec. 7(b) of the Federal Employees' Compensation Act [5 U.S.C. § 757(b)]:

> "The liability of the United States or any of its instrumentalities under sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however*, That this subsection shall not apply to a master or a member of the crew of any vessel."

The facts are not in dispute. One Backlund, an employee of the Federal Aviation Agency, while in performance of his duties, was killed when an aircraft owned and operated by appellant and in which Backlund was a passenger, crashed. Backlund's widow, suing as administratrix of his estate on behalf of herself and the surviving children, brought a wrongful death action in the state court in the State of Alaska, alleging Backlund's death was due to appellant's negligent operation, maintenance and control of the aircraft.

Appellant impleaded the Federal Aviation Agency employee, one Narcisso, who had been on duty on the day of the crash. The third party complaint alleged that the crash had been caused by Narcisso's negligent performance of his duties as an Air Traffic Control Specialist, and sought full idemnity in the event Wien was held liable to the administratrix of Backlund's estate. Appellant asked for full indemnity from Narcisso in the event it was held liable to the estate.

The cause was removed to the United States District Court for the District of Alaska. Appellant amended its third-party complaint in Federal Court to add Narcisso's employer, the United States, as a third-party defendant.

The United States filed a motion for summary judgment and attached to it certain exhibits which showed that Backlund had been an employee of the Federal Aviation Agency at the time of his death and that the Federal Bureau of Employees' Compensation had ruled that he was in the performance of his duties when killed, and that an award had been entered under which Mrs. Backlund was receiving monthly payments of $525.00 for herself and her children.

On the basis of these facts, which were not disputed by appellant, the Government contended that since Sec. 7(b) of the Federal Employees' Compensation Act barred any

tort claim by Backlund's widow against the United States, the United States could not be liable to appellant for all or part of the administratrix' claim against appellant.

On hearing of the motion for summary judgment, the District Court granted the motion and dismissed with prejudice the amended third-party complaint filed by appellant. In so doing the District Court relied upon the holding of this Court in *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379 (9th Cir. 1964).

In *Wiener*, which appellant does not seek to distinguish from the case before us, we held, in substance, that a claim for non-contractual tort indemnity can be maintained only where there is tort liability on the part of the indemnitor to the person injured. See *Wiener, supra*, pp. 403-404.

In the instant case, under the provisions of Sec. 7(b) the United States is not liable in tort to the legal representatives, spouse, dependents, or next-of-kin of Backlund for damages on account of his death.

The judgment appealed from is affirmed on the authority of *Wiener, supra.*

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,004

WIEN ALASKA AIRLINES, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL from the United States District Court for the District of Alaska.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 6, 1967

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of May 18, 1967

Before: JERTBERG and MERRILL, Circuit Judges and MATHES, District Judge

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court; IT IS ORDERED that the petition of appellant filed May 5, 1967 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 496

WIEN ALASKA AIRLINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 23–25) is reported at 375 F. 2d 736.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1967. A timely petition for rehearing was denied on May 18, 1967. The petition for a writ of certiorari was filed on August 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was error to dismiss a third-party complaint seeking indemnification from the United States in a wrongful death action where, by reason of the

plaintiff's enjoyment of compensation under the Federal Employees Compensation Act, the United States was not liable in tort to the plaintiff.

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part:

> SECTION 1346. (28 U.S.C. 1346) United States as defendant.
>
> * * * * *
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> * * * * *
>
> SECTION 2674. (28 U.S.C. 2674) Liability of United States.
>
> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The Federal Employees' Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. (Supp. II) 8101, *et seq.*, provides in pertinent part:

> § 8116(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

STATEMENT

Petitioner, Wien Alaska Airlines, was sued for wrongful death by the widow of Kurt E. Backlund, an employee of the Federal Aviation Agency, who was killed in a crash of petitioner's plane in Alaska. Mrs. Backlund alleged that the crash was caused by petitioner's negligent operation, maintenance and control of the plane. Petitioner impleaded Anthony J. Narcisso, an F.A.A. Air Traffic Control Specialist, whom petitioner alleges supplied erroneous weather reports, as the result of which the pilot of the plane encountered weather conditions which did not permit visual flight. Petitioner also impleaded the United States,

alleging that it was liable under the Federal Tort Claims Act to indemnify petitioner for any recovery by Mrs. Backlund.

The third-party claim against the government was dismissed, and the dismissal was affirmed by the court of appeals,[1] on the ground that "a claim for non-contractual tort indemnity can be maintained only where there is tort liability on the part of the indemnitor to the person injured" (Pet. App. 25). Petitioner concedes that the United States is not liable in tort to Mrs. Backlund, a beneficiary under the Federal Employees' Compensation Act (5 U.S.C. 8101, *et seq.*) which provides, that "[t]he liability of the United States * * * under this subchapter * * * with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States * * * to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States * * * because of the injury or death" (5 U.S.C. 8116(c)).

ARGUMENT

The ruling below that petitioner may not recover indemnity from the United States for petitioner's liability, if any, for the death of Kurt Backlund is correct and is not in conflict with any decision

[1] In its order granting summary judgment in favor of the government, the district court, pursuant to F.R. Civ. P. 54(b), expressly determined that there was no just reason for delay, and directed the entry of judgment. Thus the judgment was appealable.

of this Court or any court of appeals. Further review is therefore unwarranted.

1. Petitioner claims the right to indemnity, not under a contract or implied warranty arising out of a contractual relationship, or a mutual duty established by admiralty law, but rather under the Federal Tort Claims Act, 28 U.S.C. 1346(b). A precondition of governmental liability under the Federal Tort Claims Act is that a private employer must be liable in like circumstances. 28 U.S.C. 1346(b), 2674. It is clearly the general rule that, as held below, a private employer would be liable for non-contractual tort indemnity "only where there is tort liability on the part of the indemnitor to the person injured" (Pet. App. 25). See, *e.g.*, *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 139 (C.A. 2), certiorari denied, 341 U.S. 915; *Hunsucker* v. *High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768, 776 (1953). While there are no Alaska cases directly in point, the Alaska law appears to conform to the established rule applied elsewhere that the indemnitor's independent tort liability to the plaintiff is a precondition to tort indemnity.[2] Cf. *Spaeth* v. *Journal Printing Co.*, 16 Alaska 149, 155, 139 F. Supp. 188, 191 (D. Alaska) ("a person who has discharged a tort claim *to which he and others were subject* may be entitled to indemnity or contribution from the others") (dictum; emphasis added).

The rule that liability for indemnity requires an independent liability to the plaintiff in tort has

[2] That the liability of the United States for indemnity turns on whether a private person would be liable under like circumstances is established by *United States* v. *Yellow Cab Co.*, 340 U.S. 543.

been applied frequently in a context indistinguishable from the present one. Thus a private employer who, by virtue of the exclusivity provision of a State workmen's compensation statute, or of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905, is not liable in tort to his employee, also is not liable for indemnity to a third party sued by the employee.[3] If the executor or administrator of the estate of petitioner's pilot sued the United States under the Federal Tort Claims Act and the pilot were covered by the Alaska workmen's compensation statute, it seems clear that the United States could not sue petitioner for indemnity.[4]

The petition strenuously attacks the rule that the indemnitor's tort liability is a prerequisite of indemnity. However, in order to recover indemnity from the

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[3] *E.g.*, *American Mut. Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322 (C.A. 2); *Husted* v. *Consumers Power Co.*, 376 Mich. 41, 135 N.W. 2d 370 (1965); *Bankers Indemnity Ins. Co.* v. *Cleveland Hardware & Forging Co.*, 77 Ohio App. 121, 62 N.E. 2d 180, appeal dismissed, 145 Ohio St. 615, 62 N.E. 2d 251 (1945); *A. O. Smith Corp.* v. *Associated Sales & Bag Co.*, 16 Wis. 2d 145, 113 N.W. 2d 562 (1962); *Smither & Co., Inc.*, v. *Coles*, 242 F. 2d 220 (C.A.D.C.), certiorari denied, 354 U.S. 914; *LoBue* v. *United States*, 188 F. 2d 800 (C.A. 2); *Standard Wholesale Phosphate & Acid Works, Inc.* v. *Rukert Terminal Corp.*, 193 Md. 20, 65 A. 2d 304 (1949); *Williams Bros. Lumber Co.* v. *Meisel*, 85 Ga. App. 72, 74–75, 68 S.E. 2d 384, 388 (1951). See, contra, *Boston* v. *Old Orchard Business District, Inc.*, 26 Ill. App. 2d 324, 168 N.E. 2d 52 (1960); *Hendrickson* v. *Minnesota Power & Light Co.*, 258 Minn. 368, 376, 104 N.W. 2d 843, 849 (1960).

[4] The exclusivity clause in the Alaska Workmen's Compensation Act is virtually identical to the exclusivity clause in the F.E.C.A. See Alaska Statutes § 23.30.055; *Gordon* v. *Burgess Const. Co.*, 425 P. 2d 602 (Alaska 1967).

United States in this action under the Federal Tort Claims Act, it is not sufficient for the petitioner to urge (Pet. 12) that the rule absolving private employers of liability in like circumstances is "illogical and unsound"—a point that we do not concede; rather it must be shown that private employers would be liable for indemnity in like circumstances. This petitioner plainly cannot do.[5]

2. It also is manifest that *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, does not sustain petitioner's position. The sole question decided there was "whether the historic admiralty rule of divided damages in mutual fault collisions has been qualified * * * by the exclusive liability provision of the federal compensation statute" (372 U.S. at 600). Thus, *Weyerhaeuser*, in holding that the exclusivity provision did not qualify the divided damages rule to which private shipowners and the United States alike had long been subject, clearly did not decide whether a private employer would be liable for tort indemnity where he

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[5] Petitioner's contention (Pet. 20) that the decision below represents an "abrogation of a common law right of indemnity" ignores the fact that there is no "common law right of indemnity" in the absence of an independent tort liability by the indemnitor.

In this regard, we believe that petitioner's reading of the decision below, and of the earlier decision in *United Air Lines, Inc.*, v. *Wiener*, 335 F. 2d 379 (C.A. 9), certiorari dismissed, 379 U.S. 951, is not wholly accurate. A careful reading of *Wiener* shows that the holding is not that Congress intentionally barred such indemnity suits by enacting the exclusive liability clause, but rather that the negation of tort liability running from the government to its employee, eliminates one of the prerequisites for tort indemnity at common law. See 335 F. 2d at 402.

did not share a common tort liability with the party seeking indemnification.

Petitioner relies heavily on the language in *Weyerhaeuser* (372 U.S. at 601) that "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties." But that language is not a holding that third parties may not be affected by the exclusivity provision in circumstances where exclusivity clauses traditionally have negated indemnity actions. There is no reason to suppose that Congress intended the exclusivity provision it inserted in the F.E.C.A. in 1949 to have a different effect than similar provisions of other statutes, as construed in numerous judicial decisions over many years prior to 1949.[6] As pointed out in *Busey* v. *Washington*, 225 F. Supp. 416, 423 (D.D.C.), to permit a third party to recover indemnity in such circumstances would undercut the purpose of the F.E.C.A.—or of any similar workmen's compensation system—to provide not only for employees "a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." *Bradford Elec. Co.* v. *Clapper*, 286 U.S. 145, 159. The Senate Report accompanying the 1949 legislation observed:

[6] The Senate Report, in discussing the express exclusivity provision, indeed specifically notes that "Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy." S. Rep. No. 836, 81st Cong., 1st Sess., p. 23. While Congress was immediately concerned with suits by employees against the United States, and intended specifically to preclude them from suing, see *Weyerhaeuser S.S. Co.* v. *United States*, *supra*, there is no reason to assume that Congress did not intend the provision to have the same effect as the "[w]orkmen's compensation laws, in general" to which the Senate Report refers.

> * * * needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill. [S. Rep. No. 836, 71st Cong., 1st Sess. (1949), p. 23.]

The Ninth Circuit was the first court of appeals to deal with the indemnity issue since the *Weyerhaeuser* decision. It rejected petitioner's contentions in *United Air Lines, Inc.* v. *Wiener,* 335 F. 2d 379, 402–404, certiorari dismissed, 379 U.S. 951. Subsequently, the Court of Appeals for the Eighth Circuit expressly approved the decisions of the Ninth Circuit in the present case and in *Wiener*. *Maddux* v. *Cox* (C.A. 8, No. 18567, September 6, 1967). Prior to *Weyerhaeuser,* the courts had uniformly ruled that the F.E.C.A. barred tort indemnity suits. *Drake* v. *Treadwell Const. Co.,* 299 F. 2d 789 (C.A. 3), vacated, 372 U.S. 772; *Underwood* v. *United States,* 207 F. 2d 862 (C.A. 10); *Christie* v. *Powder Power Tool Corp.,* 124 F. Supp. 693 (D.D.C.). There is, therefore, no conflict between the circuits.[7]

[7] Petitioner points out (Pet. 14–17) that the decision below is contrary to the decision of the United States District Court for the Western District of Pennsylvania on remand in *Drake* v. *Treadwell Const. Co., supra* (Civ. Action No. 14517, Order of June 20, 1963). However, that case was settled before an appeal was perfected, in accordance with a stipulation dated September 13, 1963, which specified that it did "not constitute an admission of liability or fault on the part of the * * * United States." Subsequent to settlement, the United States Attorney filed a motion to dismiss the appeal referred to by petitioner (Pet. 15),

3. *United States* v. *Gilman*, 347 U.S. 507, is inapposite. That case dealt "not with the liability of the United States, but with the liability of its employees." 347 U.S. at 509. The Court held only that the government may not recover indemnity from an employee for whose negligence it has been held liable where Congress had not authorized such indemnification. Surely nothing in that holding supports the proposition that petitioner can recover indemnity from the United States where the government is not liable in the underlying tort action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.
CARL EARDLEY,
Acting Assistant Attorney General.
MORTON HOLLANDER,
WALTER H. FLEISCHER,
Attorneys.

OCTOBER 1967.

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which erroneously stated that the Solicitor General "has recommended against appeal."

In *Hart* v. *Simons*, 223 F. Supp. 109 (E.D. Pa.), as petitioner notes (Pet. 15), the plaintiff rather than the government sought dismissal of the third-party complaint. The government did not, however, waive its right to contend at a later stage that the F.E.C.A. barred the suit for indemnity. Hart and Simons ultimately settled their suit, with the settlement providing for dismissal of the third-party complaint; thus the government paid nothing. Civil No. 27953 (E.D. Pa.), Stipulation of Dismissal filed Nov. 2, 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 496

WIEN ALASKA AIRLINES, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY BRIEF OF PETITIONER

Petitioner submits this reply brief addressed to the following arguments first raised by the United States in its Brief in Opposition: (1) that the United States is not liable for non-contractual indemnity in this case because a private employer "under like circumstances"[1] would not be liable; and (2) that *Maddux* v. *Cox*. 8th Cir. No. 18,567, September 6, 1967, supports the Government's argument that the Ninth Circuit was correct in affirming the dismissal of petitioner's third-party complaint.

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[1] 28 U.S.C. § 2674.

1. The Government argues in its brief that the United States is not liable to petitioner for non-contractual indemnity in this case because a private employer "under like circumstances" would not be liable. In support of this proposition the Government cites numerous State court cases and early lower federal court decisions holding that exclusivity provisions in State Workmen's Compensation Statutes, and Section 5 of the Longshoremen's and Harbor Workers' Compensation Act,[2] bar third-party claims against employers for contribution or indemnity because their purpose is to provide these employers with "a liability which is limited and determinate." (Brief in Opp. p. 6, footnote 3, p. 8). In reply to this argument and these citations petitioner submits three responses.

First, there is a split of authority—rather than a "general rule," as urged by the Government—on the question of whether exclusivity provisions in workmen's compensation acts provide employers with completely limited liability and a defense to third-party claims for contribution or indemnity. This Court unanimously rejected such a contention, as well as all of the cases cited in the Government's brief, in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597 (1963). Professor Larson has stated in his Treatise, "Perhaps the most evenly-balanced controversy in all of compensation law is the question whether a third party in an action by the employee can get contribution or indemnity from the employer, when the employer's negligence has caused or contributed to the injury." 2 LARSON, WORKMEN'S COMPENSATION LAW § 76.10 (1952). See, *e.g.*, *Ryan Stevedoring Co.* v. *Pan-At-*

[2] 33 U.S.C. § 905.

lantic S.S. Corp., 350 U.S. 124 (1955); *The Tampico*, 45 F.Supp 174 (W.D.N.Y. 1942). Virtually all of the cases cited in the Government's brief in this case were presented to this Court in the Government's brief in *Weyerhaeuser*,[3] *supra*, and every effort was made there to persuade this Court to accept the argument that the purpose of Section 7(b) F.E.C.A.[4] is to provide the Government with a "limited and determinate" liability. In its unanimous opinion rejecting this contention this Court did not refer to *one* of the cases relied upon by the Government in its brief.

Second, a common liability of the third-party defendant to the plaintiff is *not* a "prerequisite" to indemnity, and the Ninth Circuit was clearly erroneous in so holding. (Brief in Opp. p. 7, footnote 5). The Government states again and again throughout its brief that this common liability is a prerequisite to liability for indemnity; yet it never answers petitioner's point that there are cases where no such common liability exists, see *Keleket X-Ray Corporation* v. *United States*, 275 F.2d 167 (D.C. Cir. 1960) (Pet. 12), or its argument that mutually exclusive liabilities, rather than a common liability, is the only prerequisite under the law for indemnity. (Pet. 11-13). Its silence can only be interpreted as a tacit admission that it has no answers to these questions.

Third, a private employer "under like circumstances" is an employer whose defense to petitioner's third-party claim is based upon Section 7(b) F.E.C.A.,

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[3] See Brief for the United States in *Weyerhaeuser S.S. Co.* v. *United States*, pp. 12, 13.

[4] 5 U.S.C. (Supp. II) § 8116(c).

and not some State Workmen's Compensation Act more to the Government's liking. It is interesting to note that the Government in its brief has not attempted to uphold Judge Jertberg's "distinction" between claims for contribution in admiralty and those at law, but has chosen instead to argue that the Government is not liable because a "private employer" would not be. Such a tack is an obvious attempt to avoid both the weaknesses of the Ninth Circuit's opinions in this area and this Court's construction of Section 7(b) in *Weyerhaeuser*. However, the Government cannot avoid the effects of *Weyerhaeuser* merely by referring to private employers. 28 U.S.C. § 2674 does not require a litigant to show the presence of identical private activity before it can recover against the United States. See *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955); *Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957). The instant case concerns the effect of Section 7(b) F.E.C.A. upon petitioner's third-party claim for indemnity, and no amount of discussion about "private employers" can change that fact. The Ninth Circuit held in this case that petitioner's third-party claim was properly dismissed because, "under the provisions of Section 7(b) the United States is not liable in tort to the legal representatives, spouse, dependents, or next-of-kin of Backlund for damages on account of his death." (App. 25). The reason there is no "underlying liability" here, according to the Ninth Circuit, is *solely* because of the effect of Section 7(b) F.E.C.A. If that holding is contrary to this Court's construction of Section 7(b) in *Weyerhaeuser* it must fall; and State court cases construing State workmen's compensation acts cannot save it.

2. The case of *Maddux* v. *Cox*,[5] decided by the Eighth Circuit after the filing of the petition for certiorari in this case, does not support the Government's contentions that the Ninth Circuit's opinion in the instant case is correct and not in conflict with *Weyerhaeuser*. As noted above, the instant case concerns the effect of Section 7(b) F.E.C.A. upon petitioner's third-party claim for indemnity. *Maddux* v. *Cox* has nothing to do with Section 7(b), with exclusivity provisions in workmen's compensation acts, or any related problem. It holds only that a joint tortfeasor cannot have contribution where the Government cannot be liable *at all* to the plaintiff, a serviceman. It should be noted that in the instant case, as in other workmen's compensation cases, the Government *is* liable to the plaintiff under F.E.C.A. Therefore, the question in such cases is whether indemnity requires a "common liability"—that is, "in the sense of being identical in amount or in the sense of flowing from breach of the same kind of duty." Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law (Tenta. Ed. 1958). This point has been discussed in the petition (pp. 12-13), and will not be repeated here. Suffice it to say, there is nothing in *Maddux* v. *Cox* which changes the fact that the Ninth Circuit's opinion in the instant case is clearly erroneous, is in direct conflict with this Court's decisions in *Weyerhaeuser, supra,* and *Treadwell Construction Co.* v. *United States,* 372 U.S. 772 (1963), and in direct conflict with applicable decisions in the Third Circuit. See *Hart* v. *Simmons,* 223 F.Supp. 109 (E.D.Pa. 1963); *Drake* v. *Tread-*

[5] No. 18,567, September 6, 1967 (8th Cir.)

well Construction Co., United States District Court for the Western District of Pennsylvania, Civil Action No. 14517.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILLIP D. BOSTWICK
910 17th Street, N.W.
Washington, D. C. 20006
Counsel for Petitioner

JAMES J. DELANEY, JR.
LAWRENCE R. SCHNEIDER
Of Counsel

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